

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

20,698

IN RE:	}	
	}	
MJK Clearing, Inc.,	}	Adv. Proc. No. 01-4257
	}	
Debtor.	}	

James P. Stephenson, in his	}	
capacity as Trustee for the	}	
Estate of MJK Clearing, Inc.,	}	Adv. Proc. No. 04-4165
	}	
Plaintiff,	}	
	}	
v.	}	
	}	
Kyla Fant,	}	
	}	
Defendant.	}	

DEFENDANT'S MOTION TO DISMISS, TRANSFER, OR ABSTAIN

Comes now Defendant Kyla Fant and moves that the Court Dismiss this Adversary Proceeding due to improper Venue, Statute of Limitations, or alternatively Transfer the case to the United States District Court for the Northern District of Alabama or Abstain from hearing same and as grounds therefore says as follows:

1. The Adversary Proceeding should be dismissed due to improper venue. The proper venue for this action is the United States District Court for the Northern District of Alabama per 28 U.S.C.A. § 1409 (d):

A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provision, an action on such claim may have been brought.

The Trustee makes claims against Ms. Fant through his continuation of the business of the "debtor" MJK. He alleges that Ms. Fant opened a margin loan account with R.J. Steichen & Co. that was subsequently assigned to MJK. He alleges that Ms. Fant borrowed money from Steichen and/or MJK. According to the Complaint, demand for payment of the balance on Ms. Fant's account was made on January 18, 2002. He also attaches a post petition statement from December 2001 as a basis for the claim. If the date of the statement or the demand for payment of Ms. Fant's account was when the claim arose it was after the commencement of the insolvency proceeding and may only be brought in the district court for the district where, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

Under nonbankruptcy law, this claim would be brought in a federal district court under diversity jurisdiction since all of the Trustee's claims are based on state law causes of action. It is provided in 28 U.S.C.A. § 1391 (a) that:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omission giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Ms. Fant is the only Defendant named in the Complaint. She is (and has always been) a resident of Birmingham, Alabama. There is no allegation in the Complaint that she lived anywhere else or had contact with MJK other than maintaining an account at its predecessor. The proper venue for the Trustee's claims is in the United States District Court for the Northern District of Alabama. This action should be dismissed and the trustee should be required to refile the action in the United States District Court for the Northern District of Alabama.

2. This Adversary Proceeding should be dismissed due to the Statute of Limitations. The alternative to the argument in paragraph 1 is for the Trustee to argue that the amount claimed was owed when the petition was filed. The Trustee's right to enforce such a pre-petition account would be subject to the statute of limitations provided in Ala. Code § 6-2-37, providing a period of three years to commence an action based on an account.

The Trustee's claims are based on state law causes of action. The Complaint sets out that Ms. Fant is a resident of Alabama. A statement from MJK addressed to Ms. Fant in Alabama is attached to the Complaint. The three-year period provided in § 6-2-37 is expired and the case is due to be Dismissed.

3. This Adversary Proceeding should be transferred to the appropriate venue. 28 U.S.C.A. §1412 provides that "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." This statute, codifying the doctrine of forum non conveniens, is applicable to the Bankruptcy Court since it is a unit of the District Court. In re Toxic Control Technologies, Inc., 84 B.R. 140 (Bankr. N.D. Ind. 1988).

It would be in the interest of justice to transfer this proceeding. Ms. Fant resides in Birmingham, Alabama, over one thousand miles from the location of this court. The convenience to Ms. Fant of transferring the proceeding to Alabama would greatly outweigh any inconvenience to the Trustee. The Trustee's claims are based on state law rather than federal law and do not relate to activity by Ms. Fant within the jurisdiction of this Court.

In several recent cases dealing with breach of contract, the courts have found that the interests of justice and convenience of the parties have outweighed the interest of centralized control of bankruptcy cases. In re Wheeling-Pittsburg Steel Corp., 123 B.R.

537 (Bkrcty. W.D. Pa. 1991). In re Geauga Trenching Corp., 110 B.R. 638 (1990). In re A.R.E. Manufacturing Co., Inc., 124 B.R. 912 (1991).

4. This Court should abstain from hearing this Adversary Proceeding. 28

U.S.C.A. §1334 (c) provides for abstention of the hearing of certain cases by federal district and bankruptcy courts:

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

It would be in the interest of justice to abstain in this instance and allow the proceeding to be brought in the appropriate Alabama state or federal court. To conduct this proceeding in the Bankruptcy Court for the District of Minnesota would be extremely burdensome on Ms. Fant, both physically and financially. The Eighth Circuit Court of Appeals has held that the financial situation of the parties may be considered when abstention under 28 U.S.C.A. § 1334 is contemplated. In re Titan Energy, Inc. 837 F.2d. 325 (1988). The court also stated in In re Titan that where a proceeding is based in state law and bears only a limited connection to the debtor's bankruptcy case, abstention is particularly compelling. Id.

It is not uncommon for Bankruptcy Courts to abstain from hearing actions brought by debtors or trustees attempting to enforce contracts or collect on accounts. In re Franklin Press, Inc., 46 B.R. 522 (Bkrcty. S.D. Fla. 1985). In re Cemetery Dev. Corp., 59 B.R. 115 (1986). Another Eighth Circuit Bankruptcy Court held that abstention from hearing an adversary proceeding based on state law issues was proper in Official Comm. of Unsecured Creditors v Welsh, 238 BR 819 (Bkrcty. W.D. Mo. 1999). In Welsh, the

court abstained from hearing an adversary proceeding pursuant to 1334(c)(1) where state law issues predominated, the defendants had not waived their right to trial by jury, there was no independent basis for the Court's jurisdiction, abstention would not unduly delay administration of the bankruptcy estate, and the defendants had not engaged in improper "forum shopping."

The same circumstances present in the Welsh case are present in this proceeding. The claims set out in the Adversary Proceeding are based on state law. Ms. Fant has not waived her right to trial by jury, which may not be available in the bankruptcy court. The Complaint asserts that this court has jurisdiction solely due to the insolvency proceeding filed against MJK. Abstention would produce no undue delay in the administration of the estate. There is no reason why the Trustee should not pursue this claim in the Courts of the jurisdiction in which Defendant resides.



Charles R. Johanson, III
Attorney for Defendant

OF COUNSEL:
ENGEL, HAIRSTON & JOHANSON, P.C.
P.O. Box 11405
Birmingham, AL 35202
(205) 328-4600

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on the following by placing a copy of same in the United States Mail, properly addressed, and first class postage prepaid (or by hand delivery) on this 14th day of September, 2004.

A handwritten signature in black ink, appearing to read "D. Charles MacDonald", is written over a horizontal line.

D. Charles MacDonald
Gretchen J. August
Paegre & Benson, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901